

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

)
Petition of ACS of Anchorage, Inc. Pursuant to)
Section 10 of the Communications Act of 1934, as)
amended (47 U.S.C. 160(c)), for Forbearance from)
Certain Dominant Carrier Regulation of Its)
Interstate Access Services, and for Forbearance)
from Title II Regulation of Its Broadband Services,)
in the Anchorage, Alaska, Incumbent Local)
Exchange Carrier Study Area)

WC Docket No. 06-109

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Federal Communications Commission
Office of Secretary

REPLY COMMENTS OF ACS OF ANCHORAGE, INC. IN SUPPORT OF ITS
PETITION FOR FORBEARANCE FROM CERTAIN DOMINANT CARRIER
REGULATIONS OF ITS INTERSTATE ACCESS SERVICES AND FROM TITLE II
REGULATION OF ITS BROADBAND SERVICES

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REGULATION OF ITS BROADBAND SERVICES**

ACS of Anchorage, Inc. ("ACS"), by its attorneys, hereby submits its response to the comments submitted in the above-referenced docket, regarding ACS's petition to forbear from application of certain dominant carrier regulation as applied to ACS's Anchorage, Alaska, incumbent local exchange carrier ("ILEC") study area ("Anchorage") pursuant to Section 10 of the Communications Act of 1934, as amended (the "Act").¹

I. INTRODUCTION

On May 22, 2006, ACS filed a petition for forbearance from certain dominant carrier regulation of its interstate access services and from Title II regulation of its broadband services.² Neither of the comments filed in response by General Communication, Inc.³ ("GCI")

¹ 47 U.S.C. § 160.

² *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended (47 U.S.C. 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in*

or jointly by Time Warner Telecom, Inc., CBeyond Communications, LLC, and One Communications Corp.⁴ (“TWT”) provides evidence to support continued treatment of ACS as a dominant carrier in the Anchorage study area. The Commission should find especially compelling ACS’s loss of [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of the access lines in the mass market and [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of the enterprise market.⁵ Because ACS is subject to significant competition for both access and broadband services with respect to residential and business customers and has satisfied all the criteria articulated in the *Qwest Order*, the regulations identified in ACS’s Petition are no longer necessary to facilitate competitive entry, necessary to protect consumers or consistent with the public interest.

With respect to interstate access, the Commission should follow its precedent in the *Qwest Order*⁶ and grant ACS forbearance relief based on the overwhelming market share that GCI has gained. By ACS’s estimate, as of the end of last year, GCI serves approximately [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of its mass market customers and [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of its enterprise customers using its

the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area, WC Docket No. 06-109 (filed May 22, 2006) (“ACS Petition”).

³ *Comments of General Communication, Inc. on ACS of Anchorage’s Petition for Forbearance From Certain Dominant Carrier Regulation of Its Interstate Access Services and from Title II Regulation of Its Broadband Services*, WC Docket No. 06-109 (filed Aug. 11, 2006) (“GCI Comments”).

⁴ *Opposition of Time Warner Telecom, Inc., CBeyond Communications, LLC, and One Communications Corp.*, WC Docket No. 06-109 (filed Aug. 11, 2006) (“TWT Opposition”).

⁵ *Cf. Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 ¶ 28 (2005) (“*Qwest Order*”).

⁶ *Id.* at ¶¶ 39-43.

own facilities.⁷ GCI's public statements make clear that it is continuing at a rapid pace to transition off of ACS's UNEs.⁸ Considering that GCI's non-UNE market share in providing both switched and special access services continues to grow with significant elasticity of supply and demand, and given GCI's superior size and resources, the decision to grant non-dominant treatment should be straightforward. ACS already has agreed to a cap on terminating switched access rates and similarly would agree to freezing ICLS at current per-line levels.

The enterprise market—including switched and special access services and broadband Internet services—is analyzed as a single product market.⁹ Although the Commission found insufficient evidence in the Omaha market to justify forbearance with respect to business customers in the *Qwest Order*,¹⁰ ACS's significant loss of market share compels forbearance. ACS has only incomplete information about the availability of alternative special access facilities, but even this limited data establishes GCI's market-wide facilities presence and indicates other providers of alternative facilities. GCI alleges it is unable to reach certain business customers using its own facilities without providing any specific information to back up this claim. Moreover, GCI fails to describe its extensive fiber facilities and does not provide information regarding the extent of its ability to provide special access services over these facilities or the facilities of third parties such as AT&T.

⁷ Statement of Robert G. Doucette ¶ 7, ACS Petition, attached thereto as Exhibit A ("Doucette Statement"). The mass market figure excludes broadband services, which are analyzed as a separate market, while the enterprise figure includes interstate, special access, and broadband Internet access connections. *Id.* at ¶ 3.

⁸ General Communication, Inc. Q2 2006 Earnings Call Transcript 8 (Aug. 9, 2006), attached hereto as Exhibit A ("GCI Earnings Call") (stating that it will complete upgrading almost its entire network by the end of 2007).

⁹ *Qwest Order* ¶ 22 & n.63.

¹⁰ *Id.* at ¶ 50.

The market for broadband services is undeniably competitive. Here again, the superior size and resources of ACS's competitors, market elasticities, and overall market share data prove ACS's case. The Commission has recognized that broadband competition is pervasive and has issued decisions taking a deregulatory approach to certain broadband services.¹¹ A variety of ILECs have filed broadband forbearance petitions and several have advocated relief for all ILECs nationwide.¹² In Anchorage as elsewhere, cable is the only dominant broadband provider, and GCI has [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of the mass market broadband share in Anchorage.¹³ Based on the record in this proceeding, the Commission should grant ACS's request for forbearance from Title II regulation broadband services in Anchorage. Alternatively, if the Commission should rule first on those later petitions, ACS should be included in any relief granted.

II. ACS HAS SUFFICIENTLY SPECIFIED ITS REQUESTED RELIEF

Consistent with recent precedent, ACS has detailed its desired relief with sufficient particularity for the Commission's consideration. The D.C. Circuit recently rejected

¹¹ *E.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order, 20 FCC Rcd 14853 (2005); *High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002), *aff'd Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2695 (2005).

¹² *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket 06-125 (filed June 13, 2006); *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, WC Docket 06-125 (filed June 13, 2006); *Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, WC Docket 06-125 (filed July 20, 2006) (collectively, the "BOC Petitions"); *Petition of the Embarq Local Operating Companies For Forbearance Under 47 U.S.C. § 160(c) From Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*, WC Docket No. 06-147, DA 06-1545 (filed July 28, 2006); *Petition of the Frontier and Citizens ILECs for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 06-147 (filed Aug. 4, 2006).

¹³ Doucette Statement ¶ 4.

the Commission's ruling that AT&T (at that time SBC) failed to identify with sufficient particularity the services and regulations for which it sought forbearance.¹⁴ AT&T requested forbearance from "common carrier" and "economic" regulation under Title II," without specifying the provisions of Title II this description excluded.¹⁵ Nevertheless, the D.C. Circuit concluded that this description was likely sufficiently specific based on previous FCC precedent.¹⁶ Similarly, Verizon was successful in using a broad level of generality to describe services and regulations when seeking forbearance from Title II of the Communications Act for its broadband services.¹⁷ Although Verizon provided the details of the items from which it sought forbearance only shortly before its petition was to be decided, the Commission did not deny Verizon the full relief it requested.

ACS's Petition contains a degree of specificity that far exceeds the standard established by these cases. The Petition's Appendix A lists and explains the specific dominant carrier regulations from which ACS is seeking forbearance for its interstate access services.¹⁸ The Petition itself also provides examples of regulations that would not be affected by ACS's request for relief.¹⁹ ACS points out quite clearly that wholesale exchange service would

¹⁴ *AT&T v. FCC*, 452 F.3d 830, 838-39 (D.C. Cir. 2006).

¹⁵ *Id.* at 838.

¹⁶ *Id.* at 838-39.

¹⁷ *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440 (filed Dec. 20, 2004).

¹⁸ ACS Petition app. A.

¹⁹ *Id.* at 4.

continue to be offered for resale pursuant to Section 251(c)(4) of the Act.²⁰ In addition, the six pages of the Petition devoted to the Anchorage enterprise market make clear that ACS seeks relief in both the residential and enterprise markets.²¹

However, GCI and TWT focus on semantic distinctions between “retail” and “wholesale” services. The Commission’s forbearance analysis for dominant carrier regulation focuses on retail competition.²² ACS unambiguously seeks relief from dominant carrier regulation of services the Commission classifies as “access,” but explains that end-users will continue to enjoy the protections of state regulation of retail (end-user) rates.²³ Further, ACS seeks the same relief from Title II regulation for broadband services granted to Verizon for packetized services offered at speeds greater than 200 kbps.²⁴ Several other carriers have pending forbearance petitions for these same broadband services. Thus, the scope of the ACS Petition is clear.

²⁰ See *id.* & n.6; see also ACS *Ex Parte* Filing Dated July 21, 2006, at 2-3, *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended (47 U.S.C. 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109 (filed July 21, 2006) (“ACS July *Ex Parte*”) (discussing GCI’s meritless “Motion to Dismiss”).

²¹ ACS July *Ex Parte* 2-3 (citing ACS Petition 39-45). TWT and GCI implausibly argue that ACS implies it does not seek forbearance in the enterprise market merely by stating that ACS seeks relief “consistent with” the *Qwest Order*. TWT Opposition 4; GCI Comments 3.

²² See, e.g., *Qwest Order* ¶ 25.

²³ ACS Petition 51.

²⁴ Letter from E. Shakin to M. Dortch 2, *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket 04-440 (filed Feb. 7, 2006) (describing the first of two categories for which Verizon sought relief as “packet-switched services capable of 200 kbps in each direction,” including “services that route or forward packets, frames, cells, or other data units based on the identification, address, or other routing information contained in the packets, frames, cells, or other units”).

III. THE COMMISSION SHOULD CONSIDER THE ANCHORAGE STUDY AREA AS A SINGLE GEOGRAPHIC MARKET IN ITS FORBEARANCE ANALYSIS

The Commission should base its forbearance determination on an analysis of the Anchorage study area in its entirety. In the *Qwest Order*, the Commission determined that the relevant geographic market was Qwest's service area in the Omaha Metropolitan Statistical Area ("MSA").²⁵ Although the Commission considered wire centers as separate markets in its Section 251(c)(3) forbearance analysis, it did not do so when conducting its analysis for Qwest's request for non-dominant treatment.²⁶ The Commission found it appropriate to grant forbearance from dominant carrier regulation in the entire MSA even though the cable operator did not have facilities in certain wire centers (and thus UNE forbearance was not granted in those wire centers).

ACS urges the Commission to define the geographic market broadly, as it did in the *Qwest Order*, because ACS faces extensive competition throughout this area. ACS established, in connection with its petition for forbearance from UNE obligations (in docket 05-281), that there is substantial facilities-based competition in all five of the ACS wire centers. Even if there is greater availability of facilities in some wire centers than in others, however, ACS's loss of market share and the supply and demand elasticities in the market support a study-area-wide grant of non-dominant treatment.

GCI's suggestion that the geographic markets should be smaller based on UNE availability is unwarranted. As discussed in the UNE forbearance proceeding, competition in the Anchorage market is not dependent on the availability of UNEs. There is substantial facilities-based competition in Anchorage, and GCI has publicly stated that it will end its reliance on

²⁵ *Qwest Order* ¶ 24.

²⁶ Compare *id.* at ¶ 57 with *id.* at ¶ 24.

ACS's UNEs by next year.²⁷ GCI prefers to use ACS's UNEs where it is cheaper to do so than to build out its own facilities.²⁸ Contrary to GCI's suggestion,²⁹ geographic markets are not determined by the areas in which a CLEC has chosen to deploy its own facilities.³⁰ By defining markets more narrowly than the Anchorage study area, GCI hopes to ensure that ACS continues to be burdened with unnecessary dominant carrier regulations so that GCI can maintain its regulatory advantage over ACS. Forbearing from dominant carrier regulation throughout the study area would encourage GCI to deploy facilities in these smaller areas and would put ACS and GCI on equal regulatory footing.

GCI advocates that the Commission adopt a novel approach of analyzing the enterprise product market on an individual customer basis.³¹ The D.C. Circuit recently affirmed the Commission's finding that such a building-by-building approach is an unworkable standard.³² Furthermore, GCI's suggestion would ensure that carriers never obtained Section 10 forbearance from dominant carrier regulations.

²⁷ GCI Earnings Call 8.

²⁸ ACS *Ex Parte* Filing Dated Sept. 8, 2006, at 8, *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Section 251(c)(3) and 252(d)(1) in the Anchorage LEC Study Area*, WC Docket No. 05-281 (filed Sept. 8, 2006) ("ACS Sept. UNE *Ex Parte*"); *Reply Comments of ACS of Anchorage, Inc., In Support of Its Petition for Forbearance from Section 251(c)(3) and 252(d)(1)*, WC Docket No. 05-281, at 9 (filed Feb. 23, 2006) ("ACS UNE Reply Comments").

²⁹ GCI Comments 10.

³⁰ The Commission has found that wire centers serve "as the appropriate level of geographic granularity at which to assess requesting carriers' impairment" because they capture both the actual and potential competition in a given market. *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 541 (D.C. Cir. 2006) (quoting and affirming *In the Matter of Unbundled Access to Network Elements*, Order on Remand, 20 FCC Red 2553, 2620 (2005)).

³¹ GCI Comments 8-9.

³² *Covad*, 450 F.3d at 544 (describing an individual approach as "an administrative nightmare, a font of endless litigation, and an ineffective metric of impairment" (citing *In the Matter of Unbundled Access*

Likewise, GCI's argument that forbearance would allow ACS to increase prices to customers that GCI cannot reach using its own facilities is based on the erroneous assumption that the market is not competitive. All customers in the market benefit from competitive pricing even if GCI does not serve them today, because ACS cannot profitably raise prices to those customers. Based on the high levels of competition, increasing rates for a certain class of customers is not commercially feasible. As economist Howard Shelanski explains, "[c]ustomers alienated by non-competitive pricing and/or poor service would prove easy targets for competitors whose expanded offerings are imminent."³³ This is the definition of the absence of market power.³⁴

Nor is ACS's unbundling petition relevant to this analysis. GCI is a formidable competitor in the local exchange market, as well as a leader in the long-distance market, and has exclusive facilities, which gives it significant leverage in commercial negotiations for access to ACS's facilities. Thus, if UNE forbearance is granted, ACS expects that GCI would continue to have access to ACS's network at commercially negotiated rates, provided GCI is willing to give ACS reciprocal access. Therefore, all customers in the Anchorage study area will continue to have the same competitive choices.³⁵ The extremely high levels of competition, GCI's ability to serve customers over its own facilities within each of ACS's five wire center boundaries, and area-wide rate averaging provide adequate protection against any potential anticompetitive

to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, 20 FCC Rcd 2533, 2620-25 (2005)).

³³ Statement of Howard A. Shelanski in Support of Reply Comments of ACS of Anchorage, Inc. ¶ 11, attached hereto as Exhibit B ("Shelanski Statement").

³⁴ *Qwest Order* ¶ 18 n.54 (defining market power as "the ability to raise prices by restricting output, or to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable" (quotation marks and citation omitted)).

³⁵ ACS Sept. UNE *Ex Parte* 8; ACS UNE Reply Comments 10.

behavior with respect to any individual customers in the market. Therefore, the study area is a single geographic market.

IV. ACS POSSESSES MARKET POWER IN NEITHER THE MASS MARKET NOR ENTERPRISE MARKETS

The Commission has consistently made forbearance determinations based on market share and competition in the market for retail services.³⁶ The Commission has concluded that competition in the retail market pressures ILECs to tailor wholesale offerings to grow their share of the market and thus offer customers reasonable rates.³⁷ Neither GCI nor TWT disputes the significant retail competition in Anchorage. GCI instead argues that retail competition is wholly dependent upon the availability of UNEs; however, GCI's demonstrated ability to serve both mass market and enterprise customers on its own facilities contradicts these arguments.

A. The Mass Market and Enterprise Product Markets Should Not Be Evaluated On A More Granular Basis

In its Comments, GCI advocates a market share analysis based on product markets that are more narrowly defined than mass market and enterprise. GCI asserts that the Commission should examine small, medium and large business customers as separate markets, and suggests that customers receiving service pursuant to individual term contracts should be treated as separate markets.³⁸ As discussed above with respect to the geographic market definition, parsing the enterprise product market into services that GCI deems to be more

³⁶ See, e.g., *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*; *SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*; *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*; *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496 ¶ 26 (2004) ("*Verizon Broadband Forbearance Order*").

³⁷ *Id.*

³⁸ GCI Comments 9, 13.

profitable to provide using ACS's UNEs should not preclude forbearance. Although serving certain business customers may require GCI to make investments in its facilities, nothing that GCI describes in its Comments or in the UNE forbearance petition docket equates to market power that would warrant denial of non-dominant treatment.³⁹

B. ACS Requests The Same Regulatory Treatment As A CLEC For Purposes of Switched Access Services

The respective market shares of ACS and GCI and elasticity in the Anchorage market warrant forbearance from dominant carrier regulation of switched access services. As TWT notes, "[t]he FCC's rules and past precedents define a dominant carrier as a carrier that possess market power."⁴⁰ No commenter disputes that ACS has [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of the overall switched access lines in the market and merely [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of the mass market switched access lines.⁴¹ GCI unquestionably is the dominant provider of switched access services.

³⁹ ACS Sept. UNE *Ex Parte* 15-18; ACS UNE Reply Comments 37-39. For instance, GCI does not indicate what portion of its enterprise customers require clock synchronization services or whether it could provide these services over GCI's fiber facilities. See GCI Comments 14; ACS Sept. UNE *Ex Parte* 17-18.

⁴⁰ TWT Opposition 6.

⁴¹ GCI Comments 6 ("There is no question that the Anchorage market is currently highly competitive with respect to retail services." (emphasis omitted)). TWT does not address mass market services at all.

Doucette Statement ¶ 5 (estimating that as of December 31, 2005, ACS possessed [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of the overall Anchorage local exchange market, GCI had [BEGIN CONFIDENTIAL] [END CONFIDENTIAL], and additional competitors possessed the remaining [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]); *id.* at ¶ 4 (also concluding that ACS possessed [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of the residential local exchange market, GCI had [BEGIN CONFIDENTIAL] [END CONFIDENTIAL], and AT&T Alascom possessed the remaining [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]).

GCI and other carriers have fully established networks, ensuring supply elasticity in Anchorage. As detailed in the context of ACS's UNE forbearance petition, GCI is not impaired in its ability to serve mass market or enterprise customers.⁴² Therefore, variation between areas where GCI has completed its upgrades and those in which GCI will upgrade in the coming months does not establish a lack of supply elasticity. Even if these areas were examined as markets separate from the Anchorage study area, the fact that GCI has chosen to remain on UNEs in these areas does not mean that (1) GCI and other competitors do not have additional capacity in these areas, or that (2) there are barriers to entry in these areas. Furthermore, even if UNE forbearance is granted, GCI will serve these customers either on its own facilities or on ACS's UNEs, which ACS and GCI can be expected to negotiate on a commercial basis.⁴³ Thus, there is no need to condition forbearance regarding mass market switched access on continued UNE regulation.

Based on this level of competition and elasticity in the Anchorage market, ACS should be treated as any other CLEC in the market. ACS is asking for the same level of forbearance granted for mass market access services in *Qwest*—to be regulated under “the same regime under which competitive LECs currently operate.”⁴⁴ As ACS made clear in its Petition, ACS would be subject to the same regulations as other non-dominant carriers, including the ceiling on terminating interstate switched access rates.⁴⁵ ACS is not seeking total deregulation,

⁴² See, e.g., ACS UNE Reply Comments 37-40; ACS Sept. UNE *Ex Parte* 12-18.

⁴³ See ACS UNE Reply Comments 43-44; ACS Sept. UNE *Ex Parte* 3 (discussing how “ACS would be unable to negotiate access to GCI's numerous facilities if ACS offered UNEs at prohibitively high rates or not at all”).

⁴⁴ *Qwest Order* ¶ 41.

⁴⁵ ACS Petition 4.

but rather appropriate regulatory treatment in light of the fact that ACS is no longer a dominant carrier in Anchorage.

Furthermore, treatment as a CLEC with respect to switched access services would of course entail exit of the NECA Common Line Pool, as GCI proposes.⁴⁶ As a non-dominant carrier, ACS agrees that it would no longer participate in the NECA Common Line Pool. Moreover, ACS agrees with GCI's proposal to freeze per line support at the level of ACS's last regulated rate-of-return support per line served.⁴⁷ Freezing per line support is consistent with the Commission's move towards true portability of universal service support among carriers, as well as a market-driven, deregulatory environment, without abandoning the universal service mandate under the Act.

ACS requests permissive detariffing, such as any CLEC would be eligible to invoke.⁴⁸ However, to the extent that ACS continues to provide switched access services under tariff, there is no legal impediment to its invoking "deemed lawful" status under Section 204(a)(3). Contrary to GCI's argument,⁴⁹ this Section is not limited to dominant carriers. The Commission has explicitly held that Section 204(a)(3) "does not distinguish between incumbent LEC and competitive LECs" and that "all LECs, including nondominant LECs, to the extent they file tariffs, are eligible to file tariffs on a streamlined basis."⁵⁰ Of course, if a non-dominant LEC invokes Section 61.23(c) to file a tariff on one-day's notice, or otherwise fails to follow the

⁴⁶ GCI Comments 24-25.

⁴⁷ *Id.* at 26-27.

⁴⁸ ACS Petition app. A.

⁴⁹ GCI Comments 29.

⁵⁰ *Implementation Of Section 402(b)(1)(A) Of The Telecommunications Act Of 1996*, Report and Order, 12 FCC Rcd 2170 ¶ 40 (1997).

streamlined tariff filing procedures specified in the rules, “deemed lawful” treatment would not be available.⁵¹ However, streamlined procedures and “deemed lawful” status ought to be available to ACS regardless of whether it is subject to dominant carrier regulation. ACS anticipates any interstate switched access rates it continues to tariff will be subject to both the CLEC terminating rate benchmark⁵² and competitive pressures. Nonetheless, ACS should have the option of filing tariffs on a streamlined basis, pursuant to Section 61.58 of the Rules.⁵³

C. Forbearance With Respect To Enterprise Switched and Special Access Should Not Be Dependent On The Outcome Of The UNE Petition

GCI’s attempt to dispute supply elasticity regarding special access services by once again turning to UNEs is unavailing.⁵⁴ First, GCI’s facilities-based competition does not rely on UNEs. Even after UNE forbearance, ACS will not “control[] bottleneck facilities.”⁵⁵ Second, market share and structure in the enterprise market demonstrate that dominant carrier regulation is unnecessary to ensure ACS’s special access offerings are just, reasonable, and not unjustly or unreasonably discriminatory. ACS’s market share of [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of the enterprise market establishes that it is not dominant, particularly considering that GCI has rapidly accumulated approximately [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of the market share.⁵⁶ Nearly all business customers in Anchorage have a choice of facilities-based carriers, as well as a range of

⁵¹ *Id.*

⁵² 47 C.F.R. § 61.26.

⁵³ 47 C.F.R. § 61.58.

⁵⁴ GCI Comments 9-10, 22-24.

⁵⁵ TWT Opposition 2.

⁵⁶ Doucette Statement ¶ 4.

intermodal alternatives.⁵⁷ As discussed below, there is sufficient evidence to justify treatment of ACS as non-dominant with respect to business services.

1. GCI Is Not Impaired With Respect To Business Customers Without Access To ACS's UNEs Due To Its Extensive Fiber Facilities

GCI's arguments with respect to special access services focus on its inability to provide service to large enterprise customers on its cable facilities and that it cannot deploy wireless local loops ("WLLs") on a widespread basis.⁵⁸ However, these arguments are contradicted by the high degree of supply elasticity in the enterprise market in Anchorage resulting from GCI's long history as a long-distance and competitive access provider to enterprise customers. GCI has built out extensive cable and fiber facilities which it can rapidly expand with available technologies.⁵⁹ Commercially accepted DS1 technologies currently exist in the marketplace, and there is no question that fiber is ideally suited to providing the services demanded by enterprise customers. Further, GCI recognizes that CMRS cell sites are capable of using DS1 microwave for backhaul.⁶⁰ Additionally, GCI argues that WLLs do not provide

⁵⁷ ACS Petition 40 (citing Statement of Thomas R. Meade ¶ 2, attached as Exhibit A to *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(2) and 252(d)(1) in the Anchorage LEC Study Area*, WC Docket No. 05-281 (amended and refiled Oct. 6, 2005) ("ACS UNE Petition")).

⁵⁸ GCI Comments 14-19.

⁵⁹ GCI laments that "full commercial deployment" of industry-certified business technology is "likely a good two years away." *Id.* at 15. Even if GCI waited for *certified* solutions, rather than continuing to implement industry-*accepted* technologies, a two-year delay does not constitute impairment. In the *1992 Horizontal Merger Guidelines*, the DOJ and FTC designated two years as the period in which they will consider "committed entry alternatives" in a relevant market. U.S. DOJ & FTC, 1992 HORIZONTAL MERGER GUIDELINES § 3.2, 57 Fed. Reg. 41,552 (1992). Even under GCI's overly conservative estimate of when it will be deployed, the technology should be considered in the competition analysis. Shelanski Statement ¶ 10.

⁶⁰ GCI noted in its most recent earnings release that it lost a significant fiber optic cable customer to a competitor that is using a microwave system for the customer's traffic. GCI Q2 2006 Earnings Release 2, attached hereto as Exhibit C.

robust coverage;⁶¹ however, WLL can certainly be used to fill in gaps in coverage of other technologies either in the short term or long term. Indicative of its wide-reaching network, GCI aggressively markets its enterprise services throughout Anchorage, offering a wide range of services comparable to ACS's.⁶² As ACS points out in the UNE Forbearance Petition docket, GCI is not entitled to continue its reliance on UNEs merely because it elects not to adopt cost-effective and commercially viable technologies to provide service to enterprise customers over its own facilities. Allowing GCI to perpetuate its reliance on UNEs in this scenario is contrary to the Commission's goals of promoting facilities-based competition.⁶³

GCI avoids any discussion of its ability to serve business customers using its extensive fiber facilities and provides only a partial description of its ability to use fiber to serve this class of customers. GCI's extensive fiber network⁶⁴ is ideal for serving sites that require multiple DS1s, and for bigger buildings in general. GCI serves a number of large business customers in Anchorage without the use of ACS's UNEs.⁶⁵ Additionally, although GCI claims

⁶¹ GCI Comments 18.

⁶² Statement of David C. Eisenberg ¶ 8, ACS UNE Reply Comments, attached thereto as Exhibit C ("Eisenberg UNE Reply Statement").

⁶³ See Statement of Howard A. Shelanski in Support of Petition of ACS of Anchorage, Inc. for Forbearance from Sections 251(c)(3) and 252(d)(1) ¶¶ 11-13, 25, ACS UNE Petition, attached thereto as Exhibit D.

⁶⁴ ACS UNE Reply Comments 23-24.

⁶⁵ ACS Petition 43.

that small businesses cannot economically be served by fiber,⁶⁶ other carriers in the United States have determined that deploying fiber to residential customers is profitable.⁶⁷

GCI's argument that its cable and fiber facilities are insufficient to serve a substantial number of business customers throughout Anchorage⁶⁸ is unavailing. GCI fails to submit data, both in this proceeding and in connection with the UNE petition, explaining where its customers are located in relation to its cable or fiber networks.⁶⁹ GCI's analysis regarding the percentage of residential and commercial buildings it can potentially serve is based on unsubstantiated assumptions.⁷⁰ In its analysis, GCI only cites the unexplained figure of 80 feet as the distance for serving customers from its existing cable.⁷¹ GCI's expert asserts that this distance is consistent with a drop length of 150 feet, but does not explain how the distance of a parcel relates to the drop length.⁷² GCI also fails to provide any data to support its assumption that a distance of 80 feet reasonably corresponds to the industry-recognized lengths for cable plant drops, which can be as long as 400 feet. Indeed, the 80-foot cutoff used in GCI's analysis could exclude parcels that fit within this 400-foot parameter.⁷³ Further, GCI does not offer any

⁶⁶ Declaration of Alan Mitchell ¶ 11 ("Mitchell Decl."), attached as Exhibit A to GCI Comments.

⁶⁷ Verizon is in the midst of a \$20 billion campaign to bring fiber to homes throughout the country. *See Beyond Cable. Beyond DSL*, THE WALL STREET JOURNAL (July 23, 2006); *Verizon Is Rewiring New York, Block by Block, in a Race for Survival*, THE NEW YORK TIMES (Aug. 14, 2006).

⁶⁸ GCI Comments 9.

⁶⁹ *See id.*; Mitchell Decl.

⁷⁰ *See Exhibit 1*, attached to Mitchell Decl.

⁷¹ *See Shelanski Statement* ¶ 3 (discussing Mitchell Decl. ¶¶ 3-5).

⁷² *See id.*

⁷³ *See id.*

sensitivity analysis to explain how changes in that distance will affect the number of customers that it estimates it can serve in a commercially reasonable amount of time.⁷⁴

Moreover, GCI's assumption regarding the classification of buildings as residential and commercial properties appears to be entirely arbitrary and unrelated to where the buildings are actually located.⁷⁵ GCI does nothing to demonstrate the reasonableness of the cutoff value that it selects to distinguish commercial properties from residential properties. GCI provides neither a comparison of this cutoff amount to real-world values, nor a sensitivity analysis to demonstrate whether its estimates for locations "near" its facilities might change if a different value were used.⁷⁶ Further, as Mitchell concedes, his calculations are static and do not "represent the number or percentage of business or residential facilities that GCI could serve entirely over its own facilities in a commercially reasonable time."⁷⁷ Most significantly, GCI's estimates are a poor proxy for a map of its facilities and actual customer locations identified by type and current method of facilities-based service.⁷⁸ GCI's "black box" analysis does not provide sufficient information to evaluate it in any meaningful way.⁷⁹

⁷⁴ See *id.* ¶ 4.

⁷⁵ See *id.* ¶¶ 5-6.

⁷⁶ See *id.*

⁷⁷ Mitchell Decl. ¶ 2. GCI does not mention the forward-looking analysis done by its expert in the UNE forbearance proceeding, which examined the feasibility of GCI providing service to Anchorage customers. Declaration of William P. Zarakas, *Opposition of General Communication, Inc., to the Petition for Forbearance from Sections 251(c)(3) and 252(d)(1) of the Communications Act Filed by ACS of Anchorage*, WC Docket No. 05-281 (filed Jan. 9, 2006) attached thereto as Exhibit C. See Shelanski Statement ¶ 9.

⁷⁸ Shelanski Statement ¶ 8.

⁷⁹ *Id.* at 7.

ACS has reason to believe that GCI has fiber facilities which have not yet been identified in the record and that GCI could use to serve a significant number of enterprise customers in Anchorage.⁸⁰ In response to TWT's complaint regarding ACS's incomplete descriptions of GCI's fiber facilities,⁸¹ the Commission should require GCI to present evidence of the locations of its fiber facilities and the customers it serves using these facilities. As in the UNE Forbearance Petition, GCI fails to present evidence useful for evaluating its ability to serve its customers over fiber facilities.

The Commission denied forbearance in the *Qwest Order* because Qwest failed to provide sufficient data to allow the Commission to reach a forbearance determination for the enterprise market.⁸² By contrast, GCI's demonstrated ability to compete for and win a substantial number of enterprise customers and to serve them over its own facilities enables the Commission to determine that forbearance is justified.

2. TWT's Comments Have No Bearing On The Anchorage Enterprise Market

The Commission should disregard the comments submitted by TWT as wholly irrelevant to the Anchorage market. TWT does not provide service in Alaska and does not understand the nature and scope of competition that exists in Anchorage. TWT's arguments about the cost of fiber deployment may relate to some other markets in the United States. However, GCI has already deployed a substantial amount of fiber, making these arguments

⁸⁰ Statement of Mark Enzenberger in Support of Reply Comments of ACS of Anchorage, Inc. ¶ 2, attached hereto as Exhibit D.

⁸¹ TWT Opposition 10.

⁸² *Qwest Order* ¶ 50.

moot.⁸³ As previously discussed, GCI has extensive fiber facilities in Anchorage and has control of fiber into many commercial properties in Anchorage.⁸⁴ Thus, TWT's general arguments regarding insufficient competition described in other markets are irrelevant.⁸⁵

Additionally, TWT's calculations in generating the statistic that ACS will serve [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of enterprise locations⁸⁶ are based on erroneous assumptions about GCI's ability to reach customers over its own facilities. TWT does not consider the real possibility that GCI could reach ACS's enterprise customers on its own facilities, but has not yet won these customers from ACS. Further, TWT's statistic does not account for the ever-growing number of customers GCI can serve using its own facilities.⁸⁷

D. ACS Never Was Dominant In The Market For Broadband Services

Forbearance is also warranted in the broadband product market. ACS has never qualified as a dominant carrier, as defined by the *LEC Classification Order* and reaffirmed in the *Qwest Order*.⁸⁸ The wireline and intermodal competitors in the Anchorage market have ensured that ACS possesses only [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of the

⁸³ ACS UNE Reply Comments 23-24, 46.

⁸⁴ ACS Petition 43.

⁸⁵ TWT Opposition 16. TWT additionally does not appear to understand the nature of the Anchorage enterprise market. It asserts that GCI "cannot deploy DS3s and DS1s loops [sic] in most areas." *Id.* at 10. DS3 loops are not needed in Anchorage, and GCI concedes that it already has plant "near" [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of medium and large business locations. GCI Comments 9.

⁸⁶ TWT Opposition 11.

⁸⁷ *EarthLink v. FCC*, No. 05-1087, 2006 U.S. App. LEXIS 20819, at *17-19 (D.C. Cir. Aug. 15, 2006).

⁸⁸ *Qwest Order* ¶ 18 (citing *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket 96-61, 12 FCC Rcd 15756, 15776, 15782 (1992)).

broadband mass market.⁸⁹ GCI does not dispute the fact that it, rather than ACS, is the dominant provider of broadband Internet services in Anchorage.⁹⁰ GCI's large market share demonstrates both high demand and supply elasticities. A competitor is able to acquire [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]⁹¹ of the market share only if customers are willing to switch among carriers (demand elasticity) and suppliers can relatively easily attain additional capacity (supply elasticity).⁹²

GCI's dominant market share and ACS's relative disadvantage in terms of size and resources compared to GCI will lead to greater competition in the broadband market in the future. As affirmed in a recent D.C. Circuit case, analysis of competition in the broadband market requires a "forward-looking approach."⁹³ Additional competitors such as Clearwire, AT&T Alascom, and TelAlaska—all of which have deployed fixed wireless broadband networks in Anchorage—are ready to follow GCI's lead and provide broadband service to mass market and enterprise customers.⁹⁴ Taking into account both current and future providers, it is clear that ACS faces immense competition in the provision of broadband services.

This fierce broadband competition reflects a nationwide trend. The Commission has eliminated Title II regulation of retail broadband Internet access services, recognizing the

⁸⁹ Doucette Statement ¶ 4.

⁹⁰ GCI's Comments do not contain any substantive basis for opposition to ACS's requested forbearance in the broadband market.

⁹¹ Doucette Statement ¶ 4.

⁹² *Qwest Order* ¶¶ 33, 35.

⁹³ *Earthlink*, 2006 U.S. App. LEXIS 20819, at *18 (discussing Act § 706).

⁹⁴ Statement of Charles L. Jackson in Support of Petition of ACS of Anchorage, Inc. for Forbearance From Sections 251(c)(3) and 252(d)(1) ¶ 24 (citing Clearwire map), ACS UNE Reply Comments, attached thereto as Exhibit E; Eisenberg UNE Reply Statement ¶ 10.

high levels of competition in the broadband access market between DSL and cable modem service.⁹⁵ The D.C. Circuit recently affirmed the Commission's assessment of the broadband market as lacking "the preconditions for monopoly."⁹⁶ Further, Embarq, Frontier and Citizens, and the BOCs all seek the same broadband forbearance relief as ACS requests in its Petition and as was granted to Verizon by operation of law.⁹⁷

Furthermore, TWT's discussion of packetized transmission services⁹⁸ is wholly irrelevant to this proceeding. TWT uses ACS's proceeding to reargue its case regarding Ethernet-over-TDM from WC Docket No. 06-74.⁹⁹ GCI does not provide any information in the record to suggest that it suffers from the problems TWT has experienced in other markets.

V. FORBEARANCE WILL PROTECT CONSUMERS AND SERVE THE PUBLIC INTEREST

Even if the competition in Anchorage is imperfect, and even if the Commission does not find ACS to be non-dominant across all markets, the Commission still can and should

⁹⁵ *Qwest Order* ¶ 34 (finding the Omaha broadband Internet market highly elastic and citing the Commission's similar conclusions in *Verizon Broadband Forbearance Order*, 19 FCC Rcd 21496, 21506 ¶ 22 (2004); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745, 22748 ¶ 5 (2001); *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-63, Memorandum Opinion and Order, FCC 05-148 ¶ 167 (rel. Aug. 8, 2005)).

⁹⁶ *Earthlink v. FCC*, No. 05-1087, 2006 U.S. App. LEXIS 20819, at *14 (quoting *Verizon Petition* ¶ 21-23 (elaborating that cable modem providers, rather than ILECs, control a majority of lines, and that CLECs can compete in the market by "deploying their own fiber loops or accessing ILECs' legacy copper elements")).

⁹⁷ BOC Petitions; *Local Operating Companies For Forbearance Under 47 U.S.C. § 160(c) From Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*, WC Docket No. 06-147, DA 06-1545 (filed July 28, 2006); *Petition of the Frontier and Citizens ILECs for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 06-147 (filed Aug. 4, 2006).

⁹⁸ TWT Opposition 11-15.

⁹⁹ *Id.* at 12, 13.

grant forbearance. Section 10 analysis requires the Commission to forbear requirements that are no longer needed to ensure just and reasonable charges and practices, unnecessary for the protection of consumers, and not in support of the public interest.¹⁰⁰ Consumers will be protected by the high-level of facilities-based competition in Anchorage and the continued regulation of ACS's rates and practices. ACS has a stronger case for forbearance than did other successful petitioners. For example, when the Commission declared AT&T non-dominant, it still had 60% of the long-distance market.¹⁰¹ Additionally, the FCC, through Sections 201, 202, and 251(c)(4), will continue to regulate ACS's services. ACS will remain subject to RCA provisions requiring "just and reasonable" rates.¹⁰² ACS also agrees to operate under the same ceiling on terminating interstate switched access rates imposed on Qwest pursuant to Section 61.26.¹⁰³

Forbearance will serve the public interest by promoting increased facilities-based competition. The current asymmetric regulation of telecommunications providers hinders the development of competition in Anchorage. Anchorage is currently fully competitive in all product markets. In the *Qwest Order*, the Commission noted that applying dominant carrier regulations in areas that are competitive for end users limits the party's "ability to respond to competitive forces and, therefore, its ability quickly to offer consumers new pricing plans or service packages."¹⁰⁴ The Commission's previous ruling recognizing the level of competition in

¹⁰⁰ 47 U.S.C. § 160(a).

¹⁰¹ *Motion of AT&T Corp. To be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 ¶ 68 (1995).

¹⁰² ALASKA STAT. § 42.05.301 (2006); ALASKA STAT. § 42.05.381 (2006).

¹⁰³ *Qwest Order* ¶¶ 40-41.

¹⁰⁴ *Id.* at ¶ 47.